Supreme Court, U. S.
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WM. R. STANSBURY
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Number 326.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1922.

ROBERT T. MEYER, PLAINTIFF IN ERROR,

v.

THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

REPLY BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

C. H. ALBERT,
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WEIDNER COMPANY, Law Briefs, Lincoln, Neb.

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The Federal Constitutional question was decided by the Supreme Court of Nebraska.

The truth of the foregoing is apparent from the opinion which is set out in the printed record, beginning at page 50. The following excerpts are taken therefrom.

"The enactment of such a statute comes reasonably within the police power of the state.

* * * * * * *

"It is suggested that the law is an unwarranted restriction, in that it applies to all citizens of the state and arbitrarily interferes with the rights of citizens who are not of foreign ancestry, and prevents them, without reason, from having their children taught foreign languages in school.

* * * * * * *

"Whether or not the policy of this law is correct is not for the court to say. That was a question exclusively for the legislature. The question for the court is whether the law is reasonable, and not capricious and abitrary; whether it was enacted in the interests of the welfare of the state; whether it is lawful exercise of the police power; in general, whether it is constitutional. If the policy of the law is wrong, the people of the state, through the legislature, or upon their own initiative, can change it" (pp. 52 and 53, printed record).

In the dissenting opinion, at page 55 of the printed record, the dissenting judge says:

"The matter is of grave importance, since it involves the question as to the extent that a legislature may infringe upon the fundamental rights and liberty of a citizen protected by the state and federal constitutions."

The federal question was again brought to the attention of the court by paragraphs VII, VIII and IX of the motion for rehearing. Those paragraphs are as follows:

VII.

"The court erred in deciding and holding that such statute, as construed by the court in the majority opinion filed herein, does not operate to deprive the plaintiff in error and other persons of their liberty or property without due process of law nor as an unreasonable restraint upon the liberty of the plaintiff in error and other persons in contravention of the Fourteenth Amendment to the

Constitution of the United States or of Section 3, Article I of the Constitution of the State of Nebraska."

VIII.

"The judgment of this court, affirming the judgment of conviction of the plaintiff in error, contravenes the Fourteenth Amendment to the Constitution of the United States in that it operates to deprive the plaintiff of his liberty and property without due process of law and as an unreasonable restraint upon his liberty and as a denial of the equal protection of the law."

IX.

"The said statute is discriminatory in that it unreasonably discriminates between those teaching a foreign language in a parochial or private school and those teaching such languages to pupils privately."

The judgment disposing of that motion was by the court, not by a single judge (pp. 62-63, printed record). There the court in express terms considers the federal question, and overrules the motion.

II.

The fact that the Federal question was treated by the State Court as sufficiently raised, and was dealt with by the State Court, is sufficient to confer jurisdiction on this court.

The judgment of the highest court of a state, sustaining, as a legitimate exertion of the police power of the state, a statute, the validity of which was challenged as repugnant to the Federal Constitution, is reviewable in the Federal Supreme Court by a writ of error.

Western Turf Ass'n v. *Greenberg,* 204 U. S. 359, 27 S. Ct. 384, 51 U. S. (L. ed.) 520.

Whether a federal question is properly raised in the trial court of the state is a question of state practice, and if it is passed upon and denied by the highest court of the state the

Supreme Court of the United States has jurisdiction to review the judgment of the state court.

North Carolina R. Co. v. *Zachary,* 232 U. S. 248, 34 S. Ct. 305, 58 U. S. (L. ed.) 591, Ann. Cas. 1914C 159.

Where a state court holds that a federal question is made before it, according to its practice, and proceeds to determine it, this court will regard the question as duly made.

Miedreich v. *Lauenstein,* 232 U. S. 236, 34 S. Ct. 309, 58 U. S. (L. ed.) 584.

Erie R. Co. v. *Purdy,* 185 U. S. 148, 22 S. Ct. 605, 46 U. S. (L. ed.) 847.

"While the right was not originally specially set up and claimed, * * * under the rule of this court requiring the opinions to be sent up with the record, it has frequently been held to be a sufficient compliance with the words 'specially set up and claimed,' that it was duly considered in the opinion of the court and ruled against the plaintiff in error."

San Jose Land, etc., Co. v. *San Jose Ranch Co.,* 189 U. S. 180.

Citing:

Delmas v. *Merchants' Ins. Co.,* 14 Wall, 661, 20 U. S. (L. ed.) 757.

Murdock v. *Memphis,* 20 Wall. 590, 22 U. S. (L. ed.) 429.

Crossley v. *New Orleans,* 108 U. S. 105, 2 S. Ct. 300, 27 U. S. (L. ed.) 667.

Gross v. *U. S. Mortgage Co.,* 108 U. S. 477, 2 S. Ct. 940, 27 U. S. (L. ed.) 795.

Philadelphia Fire Assn. v. *New York,* 119 U. S. 110, 7 S. Ct. 108, 30 U. S. (L. ed.) 342.

Crescent City Live-Stock Co. v. *Butchers' Union Slaughter House Co.,* 120 U. S. 141, 7 S. Ct. 472.

To the same effect are,

North Carolina R. Co. v. *Zachary, supra.*

Home for Insurables v. *New York,* 187 U. S. 155, 157, 23 S. Ct. 84, 47 U. S. (L. ed.) 117.

Haire v. *Rice,* 204 U. S. 291, 299, 27 S. Ct. 281, 51 U. S. (L. ed.) 490.

Chambers v. *Baltimore & O. R. Co.,* 207 U. S. 142, 148, 28 S. Ct. 34, 52 U. S. (L. ed.) 143.

In *Mallinckrodt Chemical Works* v. *Missouri,* 238 U. S. 41, 35 S. Ct. 671, 59 U. S. (L. ed.) 1192, the court said:

> "There is a motion to dismiss, based upon the ground that the federal questions here set up were not raised in the trial court, or in the supreme court of the state, with sufficient definiteness * * * it appears, however, from the opinion of the supreme court that the question of equal protection under the 14th Amendment was treated as being sufficiently raised, and was specifically dealt with and ruled against plaintiff in error. This is sufficient to confer jurisdiction upon this court, and the motion to dismiss must be denied."

III.

The information, which is set out at page 3 of the printed record, shows on its face that a judgment of conviction thereon would trench on the rights of the accused guaranteed by the Fourteenth Amendment to the Constitution of the United States.

An information that will not support a conviction without doing violence to the supreme law of the land does not charge an offense.

In *Ex Parte Siebold,* 100 U. S. 371, this court said:

> "The validity of the judgments is assailed on the ground that the acts of Congress under which the indictments were found are unconstitutional. * * * An unconstitutional law is void. * * * An offense created by it is not a crime. A conviction under it is not only merely erroneous, but is illegal and void. * * * The question of

the court's authority to try and imprison the party may be reviewed on *habeas corpus.* * * * We think so, because, if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes."

See also:

Minnesota v. *Barber,* 136 U. S. 313, 10 S. Ct. 862, 34 L. ed. 455 (aff. 39 Fed. 641).

In re Savage, 134 U. S. 176, 10 S. Ct. 389, 33 L. ed. 842.

In re Medley, 134 U. S. 160, 10 S. Ct. 384, 33 L. ed. 835.

In re Nielsen, 131 U. S. 176, 9 S. Ct. 672, 33 L. ed. 118.

Asher v. *Texas,* 128 U. S. 129, 9 S. Ct. 1, 32 L. ed. 368.

The sufficiency of the information was challenged at the opening of the trial (B. of Ex. p. 17, printed record) and the objection overruled. This ruling was assigned as error in the Supreme Court of the state (Par. 3, p. 2, printed record). It was necessarily involved in the decision, and the state court considered and decided it.

It would be an exceedingly technical rule that would require this court to refuse to consider the federal question involved on this appeal, but allow the plaintiff in error to obtain a review thereof by proceedings in *habeas corpus.*

IV.

Under the Nebraska practice, the sufficiency of a pleading to support a judgment may be raised by motion for rehearing in the Supreme Court.

Vila v. *G. I. El. Light etc. Co.,* 68 Neb. 223.

Kemper v. *Renshaw,* 58 Neb. 513.

State v. *Moores.* 58 Neb. 285.

Respectfully submitted,

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